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No. 83-1182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE ENSIGN-BICKFORD COMPANY,
Petitioner,
v.
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
and
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
Regulation of Ensign-Bickford by the Department of Defense Deprived the Occupational Safety and Health Administration of Jurisdiction	2
CONCLUSION	5

TABLE OF AUTHORITIES

CASES: Page

PBR, Inc. v. Secretary of Labor, 643 F.2d 890 (1st Cir. 1981) 4

United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926) 3

STATUTES AND REGULATIONS:

10 U.S.C. § 2202 ..... 2, 3

Occupational Safety and Health Act of 1970:

Section 4(b)(1), 29 U.S.C. § 653(b)(1) 2, 3, 4

Defense Acquisition Regulations, *codified in* 32 C.F.R. Ch. 1, subch. A:

DAR ¶ 1-323.1 2

DAR ¶ 7-104.79 2

OTHER AUTHORITIES:

Department of Defense Contractor's Safety Manual for Ammunition, Explosives and Related Dangerous Materials (DoD Manual 4145.26M) ..*passim*

Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971) 3

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REPLY BRIEF FOR PETITIONER

Petitioner The Ensign-Bickford Company ("Ensign-Bickford") submits this reply brief pursuant to Rule 22.5 of the Rules of this Court limited to arguments first raised in Respondents' brief in opposition.

ARGUMENT

Regulation of Ensign-Bickford by the Department of Defense Deprived the Occupational Safety and Health Administration of Jurisdiction

Section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1) (quoted Petition at 7), makes the Act inapplicable to working conditions as to which another federal agency, pursuant to statutory authority, has prescribed or enforced safety or health regulations. Ensign-Bickford was subjected to the provisions of the Department of Defense Contractor's Safety Manual for Ammunition, Explosives and Related Dangerous Materials by Department of Defense ("DoD") regulations codified at 32 C.F.R. Ch. 1, subch. A ¶¶ 1-323.1, 7-104.79. Indeed, its operating procedures had been inspected by DoD officials and approved as in compliance with DoD regulations. The promulgation of these regulations and the accompanying Manual pursuant to 10 U.S.C. § 2202 established direct DoD regulation of working conditions at Ensign-Bickford's plant, seemingly depriving the Occupational Safety and Health Administration ("OSHA") of jurisdiction. Respondents now advance the startling argument that the DoD Manual (the provisions of which provided the exclusive substantive support for the OSHA citation) does not satisfy the requirements of Section 4(b)(1) because the Secretary of Defense lacks authority to impose regulations governing employee safety.

This argument is apparently grounded on the absence of a specific reference to employee safety in 10 U.S.C. § 2202 which has as its stated purpose, "to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicating or overlapping operations or functions." However, as Respondents concede (Respondents' Brief at 6), statutory authority to pro-

mulgate safety requirements is unnecessary if that authority is evident by fair implication.[1]

Certainly the Secretary of Defense believed that he had authority to promulgate safety requirements. Employee safety is implicit in and an integral part of achieving the statutory objective of an efficient supply system by reducing downtime and permitting coordinated and uninterrupted production schedules. It does not appear that the authority of DoD to regulate its suppliers' working conditions has previously been challenged. As this Court has long held, "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

The Secretary of Defense had statutory authority to regulate Ensign-Bickford's employees' safety and he exercised it unambiguously. In order to do work for DoD of the type performed by Ensign-Bickford, an employer must obligate itself to abide by the DoD Manual. If an employer does not choose to work for DoD, then the DoD regulations would not apply and the employer would be subject to OSHA regulation.[2]

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[1] Since 10 U.S.C. § 2202 was enacted more than ten years before the Occupational Safety and Health Act, it is unreasonable to demand that DoD's statutory authorization explicitly indicate a power to preempt OSHA regulation; instead, Section 4(b)(1) creates a general exception where other agencies, like DoD, are in fact regulating employee safety.

[2] In the debates leading up to the enactment of Section 4(b)(1), it was recognized that employee safety requirements established under "various procurement laws" would preempt concurrent OSHA regulation. Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. *Legislative History of the Occupational Safety and Health Act of 1970* 1216-17 (Comm. Print 1971) (Remarks of Rep. Steiger).

Finally, because DoD *enforces* its safety requirements by contract, it does not follow, as Respondents claim, that Section 4(b)(1) is inapplicable. In *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890 (1st Cir. 1981), the Secretary of Transportation contracted for the services of a private engineering firm to draw up requirements which were not in turn expressly required by an appropriate Administrative Procedure Act rulemaking proceeding. That is not the case here where DoD has drawn its own requirements and expressly imposed them through duly promulgated regulations. The facts of this proceeding demonstrate the danger of Respondents' approach. While DoD officials approved Ensign-Bickford's procedures, OSHA found them inadequate, basing its determination on the same DoD regulations, exemplifying the duplicative and inconsistent regulation Congress sought to avoid in enacting Section 4(b)(1).

Respondents' argument ultimately reduces itself to an absurdity. For purposes of upholding a citation issued under one section of the Occupational Safety and Health Act, Respondents strongly assert the legitimacy and applicability of the DoD Manual. For purposes of avoiding the clear dictates of another section of the Occupational Safety and Health Act, the same regulations are deemed to be the product of *ultra vires* conduct by the Secretary of Defense. Ensign-Bickford urges this Court not to accept this illogical proposition and to review the court of appeals' decision on this important question of statutory construction which places numerous government contractors in danger of being subject to overlapping and inconsistent federal regulation.

CONCLUSION

For these reasons and those set forth in Ensign-Bickford's petition for a writ of certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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